SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 135

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

REPLY BRIEF.

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IN THE

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October Term, 1967
No. 1473

CHARLES JOHN FUNK,

Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,

Respondents.

REPLY BRIEF.

ARGUMENT.

Respondents' brief raises two issues, *i.e.* Jurisdiction of this court and the Law of Arbitration.

The respondent claims the petition herein was not filed within ninety (90) days as required by 28 U.S.C., Sec. 2101. We submit that the petition was presented to the office of the Clerk of this court on the ninetieth day, though it was not docketed until the ninety seventh day. It is the date of presentation of the petition for certiorari to the Clerk of this court that controls and not the date the petition is docketed.

Respondents next argue that petitioner did not set up or claim a federal question in the court below.

This matter was presented to the arbitrators as evidenced by the Dissent to Arbitration Award set forth

at pages 22 through 24 of the appendix to the petition filed herein, wherein the question of due process is clearly set forth.

The judgment on arbitration award set forth at pages 35 through 38 of the appendix to the petition filed herein shows the trial court recognized the due process question by amending the arbitration award.

It is true that this question was not specifically presented to the court of appeals. Why should it be? Petitioner was the appellant in the appellate court of the State of Arizona. The trial court had found that the part of the arbitrators award was erroneous and had entered judgment accordingly. Petitioner certainly was not in a position to appeal from a portion of the judgment which was in his favor.

Petitioner's appeal was based solely upon what he considered to be erroneous computations by the arbitrators in arriving at the amount of money to be awarded to him.

The respondents filed a cross-appeal alleging error by the trial court in modifying the arbitration award by deleting therefrom the property of petitioner involved herein.

Petitioner did in his reply brief in the Court of Appeals of Arizona point out the Dissent to arbitration award and the non-due process nature of the arbitration hearing. See page 9, appellants' reply brief in the Court of Appeals, Division One, State of Arizona.

Petitioner in his petition for rehearing filed with said Court of Appeals after its decision was handed down, argued this due process question to the court.

This was presented to the Supreme Court of Arizona by the petition for review filed with it. There are

numerous cases where the question of due process may only come into being by virtue of the decision of the court.

See for example:

Williams v. Tooke, 108 F. 2d 758, Certiorari denied 61 S. Ct. 8, 311 U.S. 655, 85 L. Ed. 419.

The real question presented in this petition for certiorari is the authority of arbitrators.

If one is to adopt the theory of respondents that once you agree to arbitration you are bound by anything the arbitrators do, then a board of arbitration is given the authority to exceed constitutional limits with impunity, an authority not exercised by the courts of this country.

Such is not true and cannot be true.

The cases cited by respondents recognize some limitation on the arbitrators.

See *Gordon v. United States,* 7 Wall. 188, cited at page 10 of respondents' brief.

The doctrine is that one is bound to the extent agreed upon. When one agrees to arbitration and in his agreement you may decide question A, there is inherent in such agreement that the arbitrators can decide that question only if there is evidence submitted from which such a determination can be made.

As stated at page 33 of Arbitration in Action, by Francis Keller:

> "* * * The parties therefore, have a right to expect a decision which determines their respective claims on the basis of the evidence submitted. * * *"

Thus petitioner is not asking for a review of the evidence as respondents would like the court to believe.

What petitioner is asserting is that an award which exceeds the authority of the arbitrators and takes property from a party thereto, is a denial of due process of law and must be struck down.

Conclusion.

We respectfully submit that the petition for certiorari filed herein was timely filed, raises a clear question of federal constitutional law, and the court should grant the same.

Respectfully submitted,

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